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No. 74-1640

In the Supreme Court of the United States

OCTOBER TERM, 1975

BETHLEHEM STEEL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In this contract dispute, petitioner claims that it was entitled to the benefit of certain "cost escalation" guidelines that were only adopted by the government after completion of the contract here in question.

In 1954, the Navy awarded petitioner two contracts to build five destroyers, notwithstanding that petitioner was not the lowest bidder, in order to permit petitioner to maintain operation of its Quincy, Massachusetts, shipbuilding facility (Pet. App. 3-4). Petitioner completed production and made final delivery in 1958.

The contracts were for a fixed price, but with an "escalation" provision for later determination of amounts the government would reimburse the contractor for increases in costs of labor and materials. The escalation clause (Article 6(e), Pet. App. 2-3) of each contract provided that:

> The Contracting Officer may deny, in whole or in part, any upward adjustment in the contract price required under this Article if [he] * * * finds that such adjustment is not required * * * to enable the Contractor to earn a fair and reasonable profit under this contract.

Pursuant to the contracts, petitioner submitted an escalation claim of $3,347,000 under contract NObs-3556. The Armed Services Board of Contract Appeals ("ASBCA") allowed the escalation to the extent of $1,064,151, which it computed as allowing a profit of 5% of costs (Pet. App. 2).[1] Petitioner contested this award by bringing suit in the Court of Claims under the Wunderlich Act, 41 U.S.C. 321 and 322. The Court of Claims vacated the award and remanded for a further determination by the ASBCA under cost escalation guidelines (the so-called "weighted guidelines") adopted as part of the Armed Services Procurement Regulations ("ASPR") after the contracts had been completed but prior to the ASBCA determination (Pet. App. 1-20). The court noted, however, that if application of those guidelines was not feasible, "the Pentagon even now could amend or supplement its regulation, and the Board would be bound, provided no impairment of vested rights was attempted" (Pet. App. 17).

After the case had been remanded, the Navy member of the ASPR Committee, the interservice rule-making body with authority to amend the ASPR, requested that the Committee issue a "deviation" which would exempt a class of contracts awarded prior to 1963 from the weighted guidelines and apply an earlier "non-weighted" set of guide-

[1]Petitioner also claimed an escalation of $2,404,900 under contract NObs 3648. This claim has been allowed in full and is no longer at issue (Pet. App. 134-135).

lines to escalation claims made under those earlier contracts. The Navy member listed ten contracts, including petitioner's, which would be subject to the deviation (Pet. App. 140-141). The basis for the proposal was that the weighted guidelines were issued in 1963 for the purpose of attracting more contractors into defense work by raising profit margins, and that this purpose would not be served by applying them retroactively. The Committee unanimously determined that the weighted guidelines were not applicable to those ten contracts and granted the deviation (Pet. App. 26-27, 140-141). The ASBCA thereupon applied the unweighted guidelines to petitioner's escalation claim, and determined that an escalation of $1,116,023 (a profit of 6.3% of cost, see note 2, *infra*) was appropriate under those guidelines (Pet. App. 130). It rejected petitioner's claim for an additional $1,695,009.

Petitioner then again brought suit in the Court of Claims seeking additional compensation. It argued that it had a vested right under the first Court of Claims' decision to have the weighted guidelines applied, that the ASPR Committee acted improperly in granting a deviation *ex parte*, and that it was "feasible" under the first decision to apply the weighted guidelines, which would have resulted in a larger recovery. The Court of Claims, in a thorough opinion, affirmed the ASBCA decision, rejecting each of petitioner's arguments (Pet. App. 134-160).

1. The Court of Claims decision is correct, and presents no issues which warrant further review by this Court. The question of which cost escalation guideline should be applied to a claim under a contract entered into before any guideline was adopted is not of recurring and substantial importance, and in any event was correctly decided below. The Court of Claims correctly found that the ASPR Committee's action in rejecting use of the weighted guidelines for petitioner's contracts was reasonable. As the court

noted, the unweighted guidelines are "fair and reasonable, of themselves * * * [and] bear a strong family resemblance to the Congressionally enacted set in the Renegotiation Act" (Pet. App. 143). Under those guidelines, petitioner will receive a reasonable profit, but not a windfall.[2]

2. Petitioner's argument that it was denied due process by the alleged "ad hoc" and "retroactive" determination by the ASPR Committee that the unweighted guidelines should be applied to determine the amount of cost escalation and thus the amount of profit is without merit. The initial Court of Claims' decision remanding the case for further proceedings suggested that the weighted guidelines be applied but noted that "[i]f we have erred in thinking the 'Weighted guidelines method' is feasible to apply to the instant contracts, the Pentagon even now could amend or supplement its regulation" (Pet. App. 17). Thus the Court of Claims in its initial decision plainly contemplated further administrative action to determine whether the weighted guidelines should be applied.

This administrative action was taken by the ASPR Committee.[3] Contrary to petitioner's assertions, the Committee

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[2]Petitioner's profit under the unweighted guidelines as approved by the Court of Claims is 6.3% of cost (Pet. App. 141). The highest cost-per-destroyer for any single contract in this series of destroyers was petitioner's cost of $17,734,867 on NObs-3556, the contract at issue here. The lowest was Bath Iron Works' $14,271,590 per ship on NObs-3615 (Pet. App. 110). The profit received by petitioner, while substantially below that of the more efficient Bath Iron Works, was higher than that received by the Ingalls Shipbuilding Company, whose cost performance was similar to petitioner's (Pet. App. 125).

[3]As the Court of Claims correctly held, the Navy member was authorized to bring the matter to the attention of the ASPR Committee, and thus there was no *ex parte* approach (Pet. App. 144). Further, unanimous consent of the committee was required by the regulations (see ASPR 1-109.3, Pet. App. 31), and was given. This was not an action that could be taken by the Navy alone.

acted entirely in conformity with applicable regulations, and nowhere does petitioner cite any regulation allegedly violated by the Committee in its consideration of whether the weighted guidelines were applicable. The Committee has the right to establish or modify provisions of the ASPR (Pet. App. 31-32), and it did so in the manner contemplated by the Court of Claims in its initial decision. In light of the unanimous finding by the Committee that the purpose for which the weighted guidelines were instituted—improving profit potentials to attract new contractors to defense work—would not be served by applying them retroactively to petitioner's contract or to other similar contracts, the Court of Claims' subsequent affirmance was in accord with its prior decision and was correct.[4]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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[4]For this same reason—that the question of which guidelines to use had not been determined by the Court of Claims' first decision—petitioner's reliance upon *Greene* v. *United States*, 376 U.S. 149, and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, is misplaced. Here the government conformed to all applicable regulations and the determination to use the unweighted guidelines was within the authority of the ASPR Committee, and was authorized by the Court of Claims.